NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review summarizes important decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to indicate cases of first impression, cases of significantly altered earlier interpretations of North Dakota law, and other cases of interest. As a special project, Associate Editors assist in researching and writing the Review.* The following topics are included in the Review:

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* The North Dakota Law Review would like to thank Associate Editor Elliot Stoll for his hard work in writing this North Dakota Supreme Court Review. Elliot is a third-year law student and former president of the School of Law's Criminal Law Association. In 2019, Elliot externed for the United States Attorney's Office for the District of North Dakota. He also interned for the Grand Forks County State's Attorney's Office from May 2020 through April 2021. Prior to law school, Elliot served as a police officer in Minnesota. He greatly appreciates the opportunity to have served the North Dakota Law Review as an associate editor, and extends heartfelt gratitude to, and admiration for, the School of Law community, especially the Law Review Board of Editors.

PRISONS – PRISONERS AND INMATES – CONSULTATION WITH COUNSEL; PRIVACY

Young v. Burleigh Morton Detention Center

In *Young v. Burleigh Morton Detention Center*,[1] Laron Young asserted two arguments on appeal from a Burleigh County District Court order granting summary judgment in favor of the Burleigh Morton Detention Center ("BMDC"): 1) "BMDC violated his Sixth Amendment right to legal counsel;" and 2) "BMDC's policy concerning inmate telephone calls violates N.D.C.C. § 12-44.1-14 . . . ."[2] The district court held: 1) "Young had not alleged facts to support a finding that he was prejudiced by the recordings and therefore his right to counsel was not violated;" and 2) "Young had not alleged facts to support a finding that BMDC violated N.D.C.C. § 12-44.1-14(1)."[3] The North Dakota Supreme Court affirmed.[4]

Reliance Telephone of Grand Forks, Inc. ("Reliance") operates the telephone system BMDC inmates use.[5] Reliance records all texts and calls to and from numbers not listed as private.[6] BMDC provides every inmate with the procedure for listing their attorney's phone number as private.[7] An inmate's attorney may also request their number be listed as private.[8] In addition, under certain circumstances, BMDC staff may enter a number as private *sua sponte*.[9]

As an inmate at BMDC during various times from 2017-2019, Young conversed with his attorney via BMDC's telephone system.[10] "It is undisputed that if any calls were recorded, it is because Young's attorneys' numbers were not effectively placed on the 'private' list, they were subject to monitoring [by BMDC]."[11] A warning also preceded every non-private call with the statement: "[t]his call is from a correctional facility and may be monitored or recorded."[12]

The North Dakota Supreme Court first addressed Young's argument that "BMDC violated his constitutional right to counsel when Reliance recorded

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1. 2021 ND 8, 953 N.W.2d 597.
2. *Id.* ¶ 1.
3. *Id.* ¶ 3.
4. *Id.* ¶¶ 1, 15.
5. *Id.* ¶ 2.
6. *Id.*
7. Brief of Appellee Burleigh Morton Detention Center ¶ 8, Young v. Burleigh Morton Det. Ctr., 2021 ND 8, 953 N.W.2d 597 (No. 20200153).
8. *Id.*
9. *Id.* ¶ 9.
10. *Id.* ¶ 6.
11. *Id.* ¶ 9.
12. *Id.* ¶ 10 (alteration in original).

and retained telephone calls between himself and his attorney."[13] Both the United States Constitution and the North Dakota Constitution guarantee a criminal defendant's right to counsel.[14] The court noted the government's "affirmative obligation not to act in a manner that circumvents and thereby dilutes" this right.[15] Moreover, the court recognized that "[i]nherent in the right to counsel is the privacy of attorney-client communications."[16]

The court outlined the facts and decision in *State v. Clark,*[17] to illustrate its standard in determining a violation of a defendant's right to counsel.[18] In *Clark*, the court ruled: "[P]ost-arrest actions that interfere with the right to counsel do not *per se* violate the Sixth Amendment. Only where the actions produce, directly or indirectly, evidence offered against defendant at trial has there been a deprivation of the right to counsel."[19]

This standard was modified, although the *Young* court terms it a "reiterat[ion]," in *Ellis v. State*:[20] "a Sixth Amendment violation occurs only if the government knowingly intrudes into the attorney-client relationship, and the intrusion demonstrably prejudices the defendant, or creates a substantial threat of prejudice."[21] The *Ellis* standard appears to add an element of intent on behalf of the government, whereas the *Clark* standard does not; and yet the *Ellis* standard reins in *Clark*'s requirement that evidence yielded from the government's intrusion actually be offered at trial, to a slightly more defendant-friendly "substantial threat of prejudice."[22] The court applied the *Ellis* standard to Young's claim.[23]

The court agreed with the district court's decision that the mere recording of Young's attorney-client communications did not establish that he was prejudiced.[24] The court also dismissed Young's "vague factual allegation[s]" that the prosecutor revealed "a portion of [Young's] defense strategy" to which only Young and his attorney were privy.[25] In short, Young did not meet his burden of proof: "Young did not identify any criminal charges he was facing, what specific recordings were used to his detriment, the outcome of any criminal proceeding, or how the recordings may have been used to the

13. Young v. Burleigh Morton Det. Ctr., 2021 ND 8, ¶ 5, 953 N.W.2d 597.
14. *Id.* ¶ 6 (citing U.S. CONST. amend. VI; N.D. CONST. art. I, § 12).
15. *Id.* (citing Ellis v. State, 2003 ND 72, ¶ 8, 660 N.W.2d 603).
16. *Id.* (citing State v. Clark, 1997 ND 199, ¶ 14, 570 N.W.2d 195).
17. 1997 ND 199, 570 N.W.2d 195.
18. *Young*, 2021 ND 8, ¶ 7.
19. *Id.* (quoting *Clark*, 1997 ND 199, ¶ 14) (internal citations omitted) (alteration in original).
20. 2003 ND 72, 660 N.W.2d 603.
21. *Young*, 2021 ND 8, ¶ 7 (quoting *Ellis*, 2003 ND 72, ¶ 16).
22. *See id.*
23. *Id.* ¶ 9.
24. *Id.* ¶ 8.
25. *Id.* ¶ 9.

government's advantage."[26] Accordingly, Young failed to "allege[] facts to support a finding that BMDC knowingly intruded into the communications he had with his attorney or that prejudice or a substantial threat of prejudice exist[ed]."[27]

Young's second argument fared no better. He argued that "BMDC violated N.D.C.C. § 12-44.1-14(1) by requiring inmates" to ensure their attorney-client communications were confidential and "by recording [his] calls."[28] Section 12-44.1-14(1) states: "Subject to reasonable safety, security, discipline, and correctional facility administration requirements, the administrator of each correctional facility shall: 1. Ensure inmates have confidential access to attorneys and their authorized representatives."[29] Young believed the statute required correctional facilities to ensure an inmate's calls "were not monitored or recorded."[30]

The court held that the statute does not obligate "correctional facilities to affirmatively identify an inmate's attorney's telephone number," but rather only provide "confidential access to their attorneys."[31] BMDC's actions providing multiple methods to register their attorney's numbers as private "does not constitute a violation of [section] 12-44.1-14(1)."[32]

In addition to the alleged statutory violation, Young argued that BMDC violated its own "Standard 84 in the North Dakota Correctional Facility Standards," the creation of which are mandated by section 12-44.1-24, by merely recording his calls.[33] This argument failed because "[t]he standards are not statutory provisions drafted by the legislature" but rather "created by the Department [of Corrections and Rehabilitation] and subject to revision by the Department."[34] Thus, "[c]ontravention of the Standards does not necessarily constitute a statutory violation. Even assuming a specific Department of Corrections and Rehabilitation standard was violated, Young's arguments and allegations do not establish a violation of N.D.C.C. § 12-44.1-14."[35]

26. *Id*.
27. *Id*.
28. *Id*. ¶ 10.
29. N.D. CENT. CODE § 12-44.1-14(1) (2021).
30. *Young*, 2021 ND 8, ¶ 12.
31. *Id*. ¶ 13.
32. *Id*.
33. *Id*. ¶ 14.
34. *Id*.
35. *Id*.

PUBLIC EMPLOYMENT – EMPLOYMENT AT-WILL

Potts v. City of Devils Lake

In *Potts v. City of Devils Lake*,[36] plaintiff Brandon Potts appealed from a Ramsey County District Court's judgment and order "grant[ing] summary judgment to the City of Devils Lake and the Devils Lake Police Department (collectively, "Devils Lake") dismissing his claim for wrongful termination."[37] On appeal, Potts, supported by the North Dakota Fraternal Order of Police ("NDFOP") as an *amicus curiae*, argued for the court to adopt a public policy exception to the general employment at-will doctrine for law enforcement officers acting in self-defense in the line of duty.[38] The North Dakota Supreme Court denied Potts' and the NDFOP's argument and affirmed the district court's judgment.[39] The court reasoned that analysis of an officer's use of force in relation to the state's "constitutional and statutory self-defense provisions" requires a case-by-case determination and that such a "fact-dependent application does not supply a clear right for us to recognize an exception to at-will employment. Instead, the Legislature is better equipped to decide whether to recognize any such specific exception to at-will employment . . . ."[40]

Potts worked as a patrolman, and then a detective, for the Devils Lake Police Department for approximately 10 years, beginning in May 2008.[41] On July 5th, 2018, Potts and another Devils Lake police officer responded to a theft and burglary in progress.[42] After arriving on scene, Potts and the other officer located and approached the suspect.[43] Believing the suspect may be armed and dangerous, Potts approached with his duty weapon drawn.[44] A physical struggle on the ground ensued between Potts and the suspect.[45] Dur-

36. 2021 ND 2, 953 N.W.2d 648.

37. *Id.* ¶ 1.

38. Appellant's Brief ¶¶ 4, 38, Potts v. City of Devils Lake, 2021 ND 2, 953 N.W.2d 648 (No. 20200144) [hereinafter Appellant's Brief]; Amicus Curiae Brief of North Dakota Fraternal Order of Police in Support of Reversal ¶¶ 2, 4-5, 23-24, Potts v. City of Devils Lake, 2021 ND 2, 953 N.W.2d 648 (No. 20200144) [hereinafter Amicus Brief].

39. *Potts*, 2021 ND 2, ¶¶ 1, 19.

40. *Id.* ¶ 18.

41. Appellant's Brief, *supra* note 38, ¶¶ 17-18, 22. The parties stipulated to the underlying facts of the case. *Potts*, 2021 ND 2, ¶ 3; *see* Brief of Appellee's ¶¶ 6-11, Potts v. City of Devils Lake, 2021 ND 2, 953 N.W.2d 648 (No. 20200144) [hereinafter Brief of Appellees].

42. Appellant's Brief, *supra* note 38, ¶ 18.

43. *Id.* ¶ 19.

44. *Id.*

45. *Id.* ¶ 20.

ing the struggle, Potts' weapon accidentally discharged and killed the suspect.[46] The police department placed Potts on administrative leave.[47] Subsequent investigations into the incident found Potts' actions during the arrest attempt were "reasonable and justifiable and that he had not violated the Devils Lake Police Department use of force or deadly force policies."[48] In February 2019, however, the police department terminated Potts.[49]

Potts sued Devils Lake, alleging his termination "was void as against public policy because the sole or primary reason for the termination was Potts' use of force in defending himself against the danger of imminent bodily injury or death."[50] In April 2020, the district court granted summary judgment in favor of Devils Lake.[51] The district court "concluded that no clear and compelling public policy exists in favor of an exception to the employment-at-will doctrine in North Dakota for law enforcement officers who act in self-defense."[52]

Justice Crothers, writing for the majority, thus identified the "sole issue on appeal" as "whether the district court erred as a matter of law in holding there is no public policy exception from the employment-at-will doctrine for law enforcement officers who act in self-defense."[53] The court noted the presumption of at-will employment in North Dakota pursuant to North Dakota Century Code section 34-03-01, which provides that "employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by this title."[54] Where no specified term of employment exists, the at-will presumption provides employers with the right to terminate employees "with or without cause."[55]

The court then identified certain *non*-public policy "exceptions" to the at-will doctrine, including "contractual rights to employment . . . [and] the statutory proscription against unlawful age discrimination in the North Dakota Human Rights Act."[56] On the other hand, the court noted its adherence

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46. *Id*.

47. *Id*. ¶ 21.

48. *Id*.

49. *Id*. ¶ 22; Potts v. City of Devils Lake, 2021 ND 2, ¶ 2, 953 N.W.2d 648; *see* Appellant's Brief, *supra* note 41, ¶ 22 ("[The police chief's] letter stated in pertinent part '[t]he situation has eroded so much that it is now evident there is simply no set of circumstances in which you can effectively perform your duties as a police officer within the community of the City of Devils Lake.'") (second alteration in original).

50. Appellant's Brief, *supra* note 41, ¶ 6; *see Potts*, 2021 ND 2, ¶ 3.

51. *Potts*, 2021 ND 2, ¶ 4.

52. *Id*.

53. *Id*. ¶ 6.

54. *Id*. ¶ 7 (quoting Yahna v. Altru Health Sys., 2015 ND 275, ¶ 8, 871 N.W.2d 580).

55. *Id*. (citing Dahlberg v. Lutheran Soc. Servs. of N.D., 2001 ND 73, ¶ 13, 625 N.W.2d 241; Jose v. Norwest Bank, 1999 ND 175, ¶¶ 10, 17, 599 N.W.2d 293).

56. *Potts*, 2021 ND 2, ¶¶ 7-8 (citing Yahna v. Altru Health Sys., 2015 ND 275, ¶ 8, 871 N.W.2d 580).

to exceptions to the at-will doctrine characterized as "public policy exceptions," including an employee honoring a subpoena and testifying truthfully, or seeking worker's compensation.[57]

North Dakota has never recognized a self-defense exception to the at-will doctrine, a fact Potts acknowledged.[58] However, Potts "assert[ed] this Court should adopt the rationale set forth" by the Utah Supreme Court and the West Virginia Supreme Court of Appeals in *Ray v. Wal-Mart Stores, Inc.*, and *Feliciano v. 7-Eleven, Inc.*, respectively, both of which provide a clear exception.[59] Basing his argument in part on analogies to the reasoning in *Ray* and *Feliciano*, Potts then sought recognition of an exception under North Dakota constitutional and statutory provisions.[60] The court summarized these provisions parenthetically:

> N.D. Const. art. I, § 1 ("All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty . . . ."); N.D.C.C. § 12.1-05-03 (providing justification for using force on another person in self-defense); N.D.C.C. § 12.1-05-02(1) ("Conduct engaged in by a public servant in the course of the person's official duties is justified when it is required or authorized by law."); and N.D.C.C. § 12.1-05-07(2)(a),(b) (providing deadly force is justified when "it is expressly authorized by law" or "used in lawful self-defense . . . if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence").[61]

Potts contended he defended himself lawfully and performed his official duty as a public servant and that "he should not lose his job for doing his job."[62] Accordingly, the court noted Potts' argument attempting to align the exception held in *Ressler*, *i.e.*, obeying a subpoena and testifying truthfully, with

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57. Ressler v. Humane Soc., 480 N.W.2d 429, 432 (N.D. 1992); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 795 (N.D. 1987); *Potts*, 2021 ND 2, ¶ 8 (quoting Dahlberg v. Lutheran Soc. Servs. of N.D., 2021 ND 73, ¶ 32, 625 N.W.2d 241); *see* Amicus Brief, *supra* note 38, ¶¶ 2, 6.

58. *Potts*, 2021 ND 2, ¶ 9.

59. *Id.*

60. *Id.* ¶ 10.

61. *Id.*

62. *Id.* ¶ 11; *see* Amicus Brief, *supra* note 38, ¶ 24. ("[T]his Court should protect North Dakota's police officers from termination of employment for being forced to exercise the constitutional and statutory right of self-defense during the course of an arrest. Further, this Court should protect police officers and citizens from the danger of a contrary conclusion - de facto encouragement for offenders to assail police and resist arrest. The public policy of North Dakota protects officers trying to do their duty. North Dakota peace officers deserve no less. The Court should declare public policy precludes termination.").

"compliance with a statutory duty, particularly when the use of force was reasonable and justified."[63]

The court also addressed the NDFOP's arguments that 1) "peace officers should not be forced to forfeit their constitutional right to self-defense on a fear of losing their job," and 2) the self-defense provisions of state law "shows clear and compelling public policy for an exception."[64] The NDFOP's argument extended to the perceived consequences of not recognizing an exception: "police officers not defending themselves fearing job loss and offenders resisting to avoid arrest."[65]

On the other hand, Devils Lake argued *Ressler* and *Krein* "involved private rather than public employers," and *Ray* and *Feliciano* "are not persuasive, are not binding, and are not the best guidance."[66] In addition, Devils Lake focused on the court's past reluctance to recognize public-policy exceptions absent a "clear and compelling public policy in favor of an exception."[67]

Ultimately, the court refused to recognize such an exception for two main reasons: 1) the exception is not "sufficiently clear under North Dakota law;"[68] and 2) "the Legislature is much better suited than the courts to identify or set public policy,"[69] and accordingly, "is better equipped to decide whether to recognize any such specific exception."[70] The court affirmed the district court's judgment that "under North Dakota law no public policy exception to the at-will employment doctrine exists for law enforcement officers who act in self-defense."[71] Justices VandeWalle and McEvers joined the majority.[72]

Justice Tufte, joined by Chief Justice Jensen, concurred in the result.[73] Although he agreed that the district court's judgment should be affirmed, Justice Tufte disagreed with the "majority's application of the standard articulated" in *Ressler* and *Krein*: "I believe that the right of self-defense readily

63. *Potts*, 2021 ND 2, ¶ 11.
64. *Id.* ¶ 12.
65. *Id.*; *see* Amicus Brief, *supra* note 38, ¶ 24.
66. *Potts*, 2021 ND 2, ¶¶ 13-14.
67. Brief of Appellees, *supra* note 41, ¶ 20; *Potts*, 2021 ND 2, ¶ 15 (holding public policy must be "sufficiently clear"). "This Court has repeatedly shown it will not create a public policy exception, but instead, only recognize those exceptions clearly evidenced by a specific statute or constitutional provision. The District Court correctly found that did not exist here." Brief of Appellees, *supra* note 41, ¶ 20.
68. *Potts*, 2021 ND 2, ¶¶ 15-16.
69. *Id.* ¶ 15.
70. *Id.* ¶ 18.
71. *Id.* ¶ 19.
72. *Id.* ¶ 21.
73. *Id.* ¶ 32 (Tufte, J., concurring in the result).

satisfies the standard articulated in *Ressler* and *Krein*, and under their rationale would justify a similar public policy exception."[74] The concurrence would "limit *Ressler* and *Krein* to their facts and make clear that requests for exceptions to statutes are properly directed at the Legislative Assembly and not the courts."[75]

As outlined by the majority, a public policy exception to the at-will doctrine exists where constitutional or statutory provisions evidence a sufficiently clear and compelling public policy.[76] Justice Tufte considered the application of this standard and identification of exceptions "implicates serious separation of powers concerns," specifically when dealing with "unambiguous statutes," like section 34-03-01, and with "no judicially administrable limiting principle to guide us in deciding which public policies merit an exception."[77] After quoting section 34-03-01, Justice Tufte stated, "[t]his statute is unambiguous."[78]

The concurrence noted the majority's exercise of at least a significant portion of legislative power[79] aligned with certain dicta in *Ressler*, "operat[ing] to round off the rough edges of the law."[80] The concurrence specifically referred to *Ressler*'s claim that "[j]udicially created exceptions to or modifications of the at-will rule have also emerged to ameliorate the sometimes harsh consequences of strict adherence to the at-will rule."[81] However, Justice Tufte wrote that "[i]f the employment at-will rule derived from a common law doctrine, this statement would be unremarkable. But in North Dakota the rule is codified, subject only to exceptions provided in Title 34."[82]

The concurrence pointed out the *Krein* court's finding of an exception on a basis departing from "*Ressler*['s] . . . somewhat higher threshold,"[83] contrasting *Krein* with case references wherein the court rejected exceptions based on an application of the *Ressler* standard.[84] In light of these decisions

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74. *Id.* ¶¶ 22-23.

75. *Id.* ¶ 23.

76. *Id.* ¶¶ 1, 4 (majority opinion).

77. *Id.* ¶ 23 (Tufte, J., concurring).

78. *Id.* ¶ 24.

79. *Id.* ¶¶ 23-25. "The City does not question the continuing vitality of these cases, but the majority, at ¶ 15, nods to their dubious foundation with a long string of citations where this Court has acknowledged that declaration of public policy is vested in the Legislative Assembly. . . . [R]equests for exceptions to statutes are properly directed at the Legislative Assembly and not the courts." *Id.* ¶ 23.

80. *Id.* ¶ 25 (quoting Ressler v. Humane Soc., 480 N.W.2d 429, 431 (N.D. 1992)).

81. *Id.* (quoting *Ressler*, 480 N.W.2d at 431).

82. *Id.*

83. *Id.* ¶ 26.

84. *Id.* (citing Peterson v. N.D. Univ. Sys., 2004 ND 82, ¶¶ 25-26, 678 N.W.2d 163; Jose v. Norwest Bank North Dakota, *N.A.*, 1999 ND 175, ¶ 21, 599 N.W.2d 293)). "None of these cases reasoned that N.D.C.C. § 34-03-01 had to be interpreted to reconcile it with a conflicting statement of public policy enacted in a different statute." *Id.*

on public policy exceptions, and the "clear and compelling" standard developed in *Ressler*, Justice Tufte "would conclude self-defense meets this standard" if in fact the court held the power to rule on it.[85] He also found Utah's "clarity and weight" rationale in *Ray* to be persuasive, but noted that "Utah retains a common-law presumption of at-will employment rather than a codified rule, so the Utah Supreme Court, in developing the common law of Utah, has more latitude to develop the nuances of this common law tort."[86]

To support his conclusion that self-defense satisfies the *Ressler* standard, Justice Tufte outlined North Dakota's constitutional "right of self-defense" enshrined in article 1, section 1, and its subsequent "amend[ment] in 1984 to expand on the point, making clear that this inalienable right of individuals includes the right 'to keep and bear arms for the defense of their person.'"[87] He also pointed to the statutory "affirmative defense to a criminal charge,"[88] *Ressler*'s reliance "on criminal statutes punishing refusal to obey a subpoena or to testify,"[89] and also the statutory defense to civil actions.[90] Once again nodding to the lack of a "limiting principle" for the court's exercise of power, Justice Tufte wrote:

> Any recognition of public policy exceptions by this Court should be on a neutral basis. I am unable to discern a neutral limiting principle that would require an exception to at-will employment for injured worker claims under a broad, general statutory statement of purpose such as N.D.C.C. § 65-01-01 but deny such an exception for exercise of an inalienable right supported by longstanding public policy such as self-defense. . . . A principle that recognizes some [rights] but not others encroaches on the proper role of the Legislative Assembly in weighing and declaring public policy. In my view, only a principle that declines all invitations to create public policy exceptions is faithful to the judicial role.[91]

85. *Id.* ¶ 27.

86. *Id.*

87. *Id.* ¶ 28 (quoting 1985 N.D. Sess. Laws ch. 702). "These clear, perhaps even majestic, statements certainly compare favorably to the mushy statement of legislative purpose in N.D.C.C. § 65-01-01 that the court relied on in *Krein*." *Id.*

88. *Id.* ¶ 29 (citing N.D. CENT. CODE § 12.1-05-03 (2021)).

89. *Id.* (citing Ressler v. Humane Soc., 480 N.W.2d 429, 432 (N.D. 1992)).

90. *Id.* (citing N.D. CENT. CODE §§ 14-02-07, 12.1-05-07.2 (2021)).

91. *Id.* ¶ 30.

The concurrence finished by again outlining the serious separation of powers issues, focusing on the lack of "judicial power to craft statutory exceptions."[92] Indeed, "[w]hen the Legislative Assembly declares public policy in statute, it deprives the courts of the flexible common law approach to incrementally develop rules and exceptions as each case arises."[93]

92. *Id.* ¶ 31.

93. *Id.* (citing N.D. CENT. CODE § 1-01-06 (2021) ("In this state there is no common law in any case in which the law is declared by the code.")).